No. 80-730

Supreme Court, U. S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT L. HELERINGER ..... **Petitioner**

versus

KENTUCKY BAR ASSOCIATION..... **Respondent**

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May an attorney be subjected to bar disciplinary sanctions by reason of his having exercised his First Amendment freedom of expression by making a public statement, out of Court, that a State Court judge's action in granting an *ex parte* restraining order in the absence of any showing of immediate injury, harm or damage to the moving party, was "highly unethical and grossly unfair"?

PARTIES TO PROCEEDING IN SUPREME COURT OF KENTUCKY

The only parties to the bar disciplinary proceeding in the supreme Court of Kentucky were Kentucky Bar Association, denominated as "complainant" and Robert L. Heleringer, petition herein, denominated as "respondent".

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OFFICIAL AND UNOFFICIAL REPORTS

The only report of the decision of the Kentucky Supreme Court is *Kentucky Bar Association v. Heleringer*, Ky., 602 S.W.2d 165 (1980).

STATEMENT OF GROUNDS OF JURISDICTION

The opinion of the Supreme Court of Kentucky was rendered on July 15, 1980, but that opinion did not constitute an order or judgment. The mandate of the Supreme Court, which made effective the opinion of the Court and which is the only order or judgment of the Supreme Court of Kentucky in this case, was entered and issued on August 5, 1980.

No orders respecting rehearing and no orders granting or denying any extensions of time within which to petition for certiorari have been sought or entered.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of the provisions of Title 28, United States Code, Sections 1257 (3) and 2101 (c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The only federal constitutional provision involved herein is the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States, and which reads in its entirety as follows:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.

Section 116 of the Constitution of the Commonwealth of Kentucky provides that:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discripline of members of the bar.

The Supreme Court of Kentucky has promulgated rules (cited as "SCR") governing the practice of law, the organization and government of the bar and procedure in disciplinary cases. Relevant provisions of SCR 3 are as follows:

> *SCR 3.070* The Board [of Governors] is the governing body of the [Kentucky Bar] Association and the agent of the Court for the purpose of administering and enforcing the Rules. It shall consist of the President, the President-Elect, the Vice-President, the Chairman of the House of Delegates, the Chairman-Elect, the immediate Past President, the Chairman of the Young Lawyers Section, who is a non-voting member, and two attorneys elected from the membership of the Association in each appellate district of the State as presently existing or hereafter created.
>
> *SCR 3.130* Except for Ethical Considerations and Disciplinary Rules insofar as they conflict with the opinion in the United States Supreme Court in *Bates v. State Bar of Arizona*, the Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the board may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.
>
> *SCR 3.380* Upon finding by the Board or Court under the provisions of Rule 3.370 of guilt or unprofessional conduct, discipline may be administered by way of admonition, private reprimand, public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or his attorney and to the attorney for the complainant, and the Court shall order the record sealed subject to reopening only on order of the Court.
>
> *SCR 3.440* The provisions of the Rules [of Civil Procedure] regarding petition for rehearing and issuance of a mandate shall apply. The Clerk shall promptly furnish a

> copy of the order of disposition to all parties and the Director [of the Kentucky Bar Association]. Every final order or opinion except those for private reprimand, shall be published as are other opinions of the Court.

Rule 65.03 of the Kentucky Rules of Civil Procedure, dealing with restraining orders, reads in relevant part as follows:

> A restraining order may be granted at the commencement of an action, or during the pendency thereof, without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.

The relevant disciplinary rules set out in the American Bar Association's Code of Professional Responsibility and relied on by the Kentucky Supreme Court are DR 1-102 (A) (5) and DR 8-102 (B), which read, respectively, as follows:

> *DR 1-102 (A) (5)* A lawyer shall not engage in conduct that is prejudicial to the administration of justice.
>
> *DR 8-102 (B)* A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

STATEMENT OF THE CASE

In 1978, the governing body of Jefferson county, Kentucky, enacted an ordinance regulating certain matters concerning the performance of abortions in Jefferson County, Kentucky. Petitioner, who is a member of Kentucky's integrated bar, and is an elected member of the Kentucky General Assembly, participated substantially in the drafting of the ordinance in question. Petitioner is a Roman Catholic, a member of the Right to Life movement and is vigorously opposed for religious and moral reasons to the performance of abortions.

Following the enactment of the ordinance, which was not to take effect until January 1, 1979, a proceeding was commenced in the Circuit Court of Jefferson County, Kentucky, by a medical doctor whose practice consists mainly in the performance of

abortions, seeking to enjoin the government of Jefferson County, Kentucky from enforcing the ordinance. The case was assigned to Honorable Benjamin F. Shobe, who scheduled a hearing on the plaintiff's motion for a restraining order for 1:00 P.M., on December 19, 1978. Under Kentucky's Rules of Civil Procedure, a restraining order may be granted only if it is:

> *** clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be seved and a hearing had thereon.

The interests of Jefferson County, Kentucky were to be represented by the Office of the Jefferson County Attorney and, in particular, by one Edward L. Schoenbaechler, Assistant County Attorney. At approximately 12:50 P.M., on December 19, 1978, ten minutes before the hearing was scheduled to commence, Schoenbaechler informed Judge Shobe that he was engaged in the trial of a criminal case in another Court located in the same building, requested Judge Shobe to postpone the hearing, whereupon Judge Shobe stated, "That's no problem. We'll wait for you."

Thereupon, in the absence of Assistant County Attorney Schoenbaechler and in the absence of any other attorney representing the interests of the government of Jefferson County, Kentucky, the Court proceeded to take up the plaintiff's motion for a restraining order against the enforcement of the abortion control ordinance, which was not scheduled to take legal effect for another thirteen days. No effort was made by Judge Shobe, who had available to him one or more bailiffs, to procure Assistant County Attorney Schoenbaechler's presence at the hearing, nor was any other effort of any kind made to notify the Office of the County Attorney that the hearing was about to take place. The courtroom was well-attended by members of the news media, including photographers and television camera operators with television cameras.

Petitioner thereupon left the courtroom to attempt to find Schoenbaechler. When Petitioner and Schoenbaechler returned to the Court, they discovered that Judge Shobe had, at 1:54 P.M., issued a restraining order against the County's enforcement of the

ordinance, which, as noted above, would not in any event take effect until January 1, 1979, thirteen days later.

At a press conference held the next day by Right to Life of Louisville, Inc., petitioner publicly stated that the refusal of Judge Shobe to defer ruling on the plaintiff's motion for a restraining order or to procure the attendance of a representative of the Office of the Jefferson County Attorney was "highly unethical and grossly unfair." His comments were reported in the news media. Thereafter, Judge Shobe filed a complaint with the Director of the Kentucky Bar Association, charging the petitioner with unethical and unprofessional conduct and with conduct tending to bring the bench and bar into disrepute. His charge was based solely on the petitioner's having publicly stated that Judge Shobe's conduct of the hearing on December 19, 1978 was "highly unethical and grossly unfair."

The Director of the Kentucky Bar Association notified the petitioner that a complaint had been filed against him, and advised the petitioner that he had fifteen days to answer.

Within the allotted fifteen days, petitioner answered the complaint under oath, admitting that he uttered the words in question, denying that he "called a press conference" as Judge Shobe accused him of and asserting his First Amendment privilege of freedom of expression as a defense.

On August 9, 1979, the Inquiry Tribunal of the Kentucky Bar Association filed a disciplinary charge against the petitioner, to the effect that his attendance at a press conference, whereat he stated that Judge Shobe's actions were "highly unethical and grossly unfair", constituted "...unethical and unprofessional conduct tending to bring the bench and bar into disrepute" and recommended that an appropriate degree of discipline be administered to the petitioner.

The petitioner moved the Kentucky Bar Association for a more definite statement. The Kentucky Bar Association responded by stating, (i) that disciplinary proceedings are not adversary in nature, that rather are fact finding inquiries into what may have constituted unethical or unprofessional conduct; (ii) the petitioner may be charged with any violation of the American Bar Association Code of Professional Responsibility, as well as any other conduct tending to bring the bench and bar into disrepute; and (iii) the charge includes, but is not limited to, violations of

DR 1-102(A)(6) and 8-102(B), as amplified by ethical considerations 8-6, 9-2 and 9-6 of the American Bar Association Code of Professional Responsibility.

The petitioner then answered the Bar complaint, by admitting that he uttered the words in question, again invoking his First Amendment privilege and denying that his conduct was either unethical or unprofessional.

A "trial hearing" was held before a Trial Commissioner appointed by the Chairman of the House of Delegates of the Kentucky Bar Association on November 28, 1979. The Trial Commissioner specifically found there was no urgency for a decision by Judge Shobe on December 19, 1978, on the plaintiff's motion for a restraining order, since there was additional time to hold a hearing prior to the effective date of the order.

The Board of Governors of the Kentucky Bar Association found the petitioner guilty as charged, filed its report with the Clerk of the Supreme Court of Kentucky, and recommended that the petitioner be publicly reprimanded.

The petitioner requested the Supreme Court of Kentucky to review the action of the Board of Governors. On July 15, 1980, the Supreme Court of Kentucky rendered its opinion finding that the petitioner was guilty of "unethical and unprofessional conduct which tended to bring the bench and bar into disrepute." That finding was based on petitioner's having exercised his right of expression by characterizing Judge Shobe's actions, described above as "highly unethical and grossly unfair." On August 5, 1980, the Supreme Court of Kentucky entered and issued its mandate, in the form of an order of public reprimand of the petitioner.

The petitioner raised the defense that he was being punished for his having exercised his freedom of expression under the First Amendment to the Constitution of the United States at all stages of the proceedings against him, namely:

1. Petitioner's sworn response to Judge Shobe's complaint, at p.3, where petitioner stated:

> In conclusion, I would endorse the Supreme Court's admonition in the *Konigsberg* case:
>
> "A bar composed of lawyers of good moral character is a worthy objective but it is unnecessary

> to sacrifice vital freedoms in order to obtain that goal. It is also important both to society and the bar itself that lawyers be unintimidated — free to think, speak, and act as members of an Independent Bar."
>
> *Konigsberg v. State Bar*, 353 U.S. 252, at 273 (1957).

2. Petitioner's answer to the charge made by the Kentucky Bar Association Inquiry Tribunal, where petitioner stated:

> 3. DR 8-102 (B) is a much more relevant charge, but it too is baseless. My criticisms of Judge Shobe's conduct were not "false accusations," but legitimate criticism of his actions. "Courts are not, and should not be, immune to such criticism."
>
> *Konigsberg v. State Bar of California*, 353 U.S. 252, at 269 (1957).
>
> 4. In addition, I restate and reaffirm, in its entirety my original answer to Judge Shobe's original complaint, filed with the Complainant on or about January 24, 1979, a copy of which is attached hereto.

3. Petitioner's brief filed February 11, 1980, addressed to the Board of Governors of the Kentucky Bar Association, at p.5, where petitioner's counsel stated:

> The Supreme Court of the United States in *Ashton v. Kentucky*, 384 U.S. 195 ... has specifically held that no organization under the guise of regulation may prohibit the use of any word in our society unless it is obscene. Mr. Heleringer as a citizen of the United States was quoted in the free press as using the word "unethical." The vague and totally undefined "charge" of "tending to bring the bench and bar of Kentucky into disrepute" is Constitutionally void.

4. In his "Notice for Review and Brief of Respondent" filed with the Kentucky Supreme Court, at pp.2, 3, 4, 6, 7, and 8, counsel for the petitioner squarely argued that petitioner should not be punished for exercising his First Amendment right of freedom of expression, citing First Amendment principles as enunciated in *Ashton v. Kentucky*, 348 U.S. 195 (1966); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Re Sawyer*, 360 U.S. 622

(1959); and otherwise alluding to the principles of freedom of speech and expression.

The Board of Governors of the Kentucky Bar Association, in its opinion filed on March 25, 1980, rejected the petitioner's First Amendment defense, holding the speech in question not to be protected as against the State's interest in maintaining the respect of the public for its judiciary [Opinion of the Board of Governors, at p.4], and on the grounds that attorneys must maintain the respect due to the Courts of Justice and to judicial officers [Opinion of the Board of Governors, p.6].

The Supreme Court of Kentucky also rejected petitioner's First Amendment defense, holding (i) that while an attorney has the right to criticize the Courts and their decisions, charges of unethical conduct must be made only in good faith supported by substantial competent evidence and (ii) that such charges should only be made to Kentucky's Judicial Retirement and Removal Commission. See *Kentucky Bar Association v. Heleringer*, Ky., 602 S.W.2d 165, at 168 (1980).

ARGUMENT

The writ of certiorari should be granted because the Kentucky Supreme Court, in *Kentucky Bar Association v. Heleringer*, Ky., 602 S.W.2d 165 (1980), decided an important question of federal law in a way in conflict with applicable decisions of this Court. *Re Sawyer*, 360 U.S. 622 (1959); *Ashton v. Kentucky*, 348 U.S. 195 (1966); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

This Court has not addressed the First Amendment rights of attorneys since *Re Sawyer*, *supra*; nor has the Court recently — if ever — clearly determined whether an attorney should be treated differently from any other citizen in respect of free out-of-court expression concerning the competence, ethics or integrity of members of the judiciary.

This case presents an excellent factual setting within which this Court should make clear that good faith out-of-court criticism by an attorney, who is also an elected member of a State's General Assembly, of a member of the judiciary is protected speech, and cannot be the subject of Bar disciplinary action.

The factual record clearly reveals that under the provisions of Kentucky Rule of Civil Procedure 65.03, Judge Shobe should not have issued the restraining order in question on December 19,

1978, in the absence of the attorney for Jefferson County, Kentucky, because there could be no possible showing of great, immediate or irreparable injury, harm or damage to the applicant before notice could be served or a hearing held. Such is the case because the ordinance the enforcement of which was sought to be restrained would not take legal effect until January 1, 1979, thirteen days later, thus affording ample time for an orderly hearing to be conducted at which the County's interests could be represented and its arguments advanced. Petitioner's criticism of Judge Shobe's overall conduct of the hearing held on December 19, 1978, was warranted, was made in good faith and was backed by substantial evidence.

CONCLUSION

For the foregoing reasons, the petitioner prays the Court to issue its writ of certiorari, directed to the Supreme Court of Kentucky; and, upon review of the record below, after appropriate briefing and argument, to reverse the judgment of the Supreme Court of Kentucky which publically reprimanded the petitioner for his lawful and proper exercise of his First Amendment right of freedom of expression.

Respectfully submitted,

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RENDERED: July 15, 1980
To Be Published

SUPREME COURT OF KENTUCKY
80 SC 188 KB

KENTUCKY BAR ASSOCIATION ..... COMPLAINANT

V. IN SUPREME COURT

ROBERT L. HELERINGER ..... RESPONDENT

PER CURIAM

The Board of Governors of the Kentucky Bar Association concluded that the Respondent's statements at a press conference served to undermine public confidence in the integrity of the judicial process and tended to bring the bench and bar into disrepute. The Board found him guilty of unprofessional conduct as charged and recommended a public reprimand. The Respondent claims that his comments have the protection of the first amendement and has sought review of the board's findings and recommendation. We hold that Respondent's comments made in their context were not speech immune from professional discipline.

This professional misconduct arose out of the events surrounding litigation to determine the constitutionality of an abortion regulation ordinance passed by the Jefferson Fiscal Court, the substance of which Respondent drafted and vehemently supported. A hearing on a Restraining Order to prohibit the enforcement of the ordinance was scheduled for 1:00 p.m. December 19, 1978 before Judge Shobe of the Jefferson Circuit Court. The court had recessed a criminal trial until 1:30 p.m. that day in order to accommodate the hearing. At approximately 12:50 p.m. the assistant county attorney who was to argue against the restraining order on behalf of the fiscal court came to the

judge's chambers and requested a short delay of the hearing because he was involved in a proceeding in the Jeffrson District Court being held in another part of the building. The court acquiesced.

At 1:30 p.m. court was opened, but the assistant county attorney was not present. The Respondent tendered a motion to intervene in the proceeding on behalf of Right to Life of Louisville, Inc., which the court acknowledged but did not order filed, indicating that he was inclined to overrule the motion at a later date. The court proceeded to hear the motion for a restraining order *ex parte* while Respondent sought out the assistant county attorney. Upon arriving in the circuit court, they found the hearing had been concluded and the restraining order entered at 1:54 p.m.

The following day Right to Life of Louisville, Inc., of which Respondent is a director, called a press conference which was heavily attended by the local media. According to the trial commissioner's findings, the atmosphere was "highly emotional." During the press conference, Respondent called the refusal of Judge Shobe to wait longer for or to seek out the assistant county attorney "highly unethical and grossly unfair." This remark is the the basis for this disciplinary action.

At the outset we note that there is no question as to the content of the statement. Indeed, Respondent defended the substance of the remarks in a reply to the Bar Association stating, "I did indeed describe Judge Shobe's actions that day as unethical and unfair. Let there be no doubt that I absolutely stand by the merits of that evaluation and will, under no circumstances, retract them."

This court "recognizes and accepts the principles embodied in the American Bar Association Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, ..." SCR 3.130. DR 1-102(A)(5) directs "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." DR 8-102(B) states "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

CR 65.03 permits restraining orders to be issued "without notice" on an *ex parte* basis. As a member of the practicing bar

Respondent knew, or should have known, that an *ex parte* disposition of the application for a restraining order was proper at the time he participated in the press conference. On the other hand, the general lay public would not have been aware that a restraining order could be issued without an adversary hearing. Respondent's assertion at the highly charged press conference raised the specter of a judicial officer being in complicity with the opponents of the ordinance, of one who abused the awesome power of injunctive relief. While we neither approve nor condemn the court's decision to proceed *ex parte* in a politically sensitive hearing, his conduct was not "highly unethical and grossly unfair" as Respondent charged during the press conference. The court acted within the discretion given by the Civil Rules.

The precedent of Kentucky Bar Association v. Nall, Ky., ___ S.W. 2d ___ (April 22, 1980) would ordinarily require us to decide this case against the Respondent at this point. However, he asserts that his comments cannot be the basis for disciplinary action against him because it should be considered protected speech under the first amendment. This point requires a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting an attorney's right to free expression.

The United States Supreme Court has addressed this issue generally in the case of In re Sawyer, 360 U.S. 622, 3 L. E. 2d 1743, 79 S. Ct. 1376 (1959). There the court in a five to four decision evaluated the record and held that the conduct of Sawyer during a public speech did not impugn the integrity of the judge in a current Smith Act trial. The court held tht the lawyer's comments about the "shocking and horrible things that go on at the trial" and that "[t]here's no such thing as a fair trial in a Smith Act case" were fair criticism of the law itself and the federal government's prosecutorial policy, not personal criticism aimed at the particular trial judge. The court began "with the proposition that lawyers are free to criticize the state of the law." In re Sawyer, supra at 631. Criticism of the law is not, *per se,* impermissible criticism of the judicial system. In the words of the *Sawyer* court, "To say that 'the law is an ass, a idiot' is not to impugn the character of those who must administer it. " *Id.* at 634.

The court also noted that "a lawyer may criticize the law-enforcement agencies of the government, and the prosecution,

even to the extent of suggesting wrongdoing on their part, without by that token impugning the judiciary." *Id.* at 632. Next, the court stated that a lawyer can properly criticize a judge's view of the law. "If [the judge] was said to be wrong on his law, it is no matter; appelate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make [the lawyer's] speech look like tame stuff indeed. [She] did not say [the judge] was corrupt or venal or stupid or incompetent. The public attribution of honest error to the judiciary is no cause for professional discipline in this country." *Id* at 635.

Finally, the court noted that "surely permissible criticism may as well be made to a lay audience as to a professional." *Id* at 632. "A lawyer does not acquire any license to do these things by not being presently engaged in a case. They are equally serious whether he is currently engaged in litigation before the judge or not. We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice." *Id.* at 636.

Implicit in this statement of permisible criticism of the law and judiciary by the *Sawyer* court is that instances can exist wherein an attorney's criticism and conduct would be impermisible and the proper subject of profesional oversight. We observe, as did the court in Matter of Frerichs, ____ Iowa ____, 238 N.W. 2d 764 (1976), that Justice Stewart, concurring in the result of *Sawyer,* was speaking for five members of the court when he stated:

> "If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has show necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require absten-

> tion from what in other circumstances might be constitutionally protected speech."

In re Sawyer, supra at 646-47 (Stewart, J., concurring.)

We have previously, yet infrequently, had occasion to review charges of professional misconduct by attorneys who by their conduct and comments chip away at public confidence in the integrity of the judicial system. In Kentucky State Bar Association v. Lewis, Ky., 282 S.W. 2d 321 (1955) the attorneys involved charged in pleadings and in the local newspaper that a change in the assignment of special judges was politically motivated. We recognized that an attorney, just as any citizen has the right to criticize the courts and their decisions, but charges of corruption or unethical conduct must be made only in good faith supported by substantial competent evidence. The attorney "owes it to himself as an attorney, to his profession, and to the Court to help maintain the dignity and decorum of the Court, and thus maintain the respect of the people for judicial processes." KSBA v. Lewis, supra, at 324. Recently, in KBA v. Nall, supra, we applied this rule to an attorney who described a proceeding before a hearing officer of an administrative body as a "mere farce" and a "Kangaroo court" during a radio station interview. Insolent, impudent, and derogatory conduct can only serve to bring the judicial system into discredit in the public mind. *See also* Kentucky Bar Asociation v. Getty, Ky., 535 S.W. 2d 91 (1975) *cert. denied* 423 U.S. 1048.

We are not alone in our opinion that by coming to the bar an attorney incurs the ethical obligation not bring the bench and bar into disrepute by unfounded public criticism. "Our system of justice rests upon the mutual regard of the bench and bar." Matter of Frerichs, supra at 766. "[i]n the case of a lawyer an abuse of the right of free spech may be some index of his character or fitness to be a lawyer." In re Lacey, ____ S.D. ____, 283 N.W. 2d 250, 252 (1979) *quoting* In re Gorsuch, 76 S.D. 191, 75 N.W. 2d 644, 57 A.L.R. 2d 1355 (1956). "Nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public. In re Raggio, 87 Nev. 369, 371,487 P. 2d 499, 500 (1971). *See also*, In re Glenn, 256 Iowa 1233, 130 N.W. 2d 672, 12 A.L.R. 3d 1398 (1964); ABA Code of Professional Responsibility, EC 8-6; Annot., 12 A.L.R. 3d 1408; Annot., 56 L.Ed. 2d 841, 855-69. *But*

see, Justice of the Appellate Division v. Erdmann, 33 N.Y. 2d 559, 347 N.Y.S. 2d 441, 301 N.E. 2d 426 (1973); State Bar v. Semaan, Tex. Civ. App., 508 S.W. 2d 429 (1974); Polk v. State Bar of Texas, N.D. Tex., 374 F. Supp. 784 (1974).

We conclude as did the Board of Governors that Respondent's public attribution of "highly unethical and grossly unfair" behavior to a named sitting judge, a charge that Respondent knew, or should have known, was unwarranted, was unethical and unprofessional conduct tending to bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process. If the Respondent had had reason to believe in good faith that the trial judge had engaged in proscribed conduct, then the proper forum in which to have made his claim was the Judicial Retirement and Removal Commission as provided in our Constitution, Section 121, and in our rules of court, SCR 4.000-4.300.

Taking into account the sincerity of the Respondent, his relative inexperience at the bar, the emotional issue involved, and our recent disposition of a similar case, we concur with the recommendation of the Board of Governors that Respondent be publicly reprimanded. However, while two recent instances such as this one may be a coincidence, three would certainly indicate an unwelcome trend. It is enough to say that in the future a stiffer penalty may be imposed. *See* KSBA v. Lewis, supra.

"[E]very lawyer, worthy of respect, realizes that public confidence in our courts is the cornerstone of our governmental structure, and will refrain from unjustified attack on the character of judges, while recognizing the duty to denounce and expose a corrupt or dishonest judge." KSBA v. Lewis, supra, at 326.

This court finds the Respondent, Robert L. Heleringer, guilty of unprofessional and unethical conduct which tended to bring the bench and bar of the Commonwealth of Kentucky into disrepute. He is hereby publicly reprimanded and directed to pay the costs of these proceedings.

All concur.

[Filed March 25, 1980]

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION ..... COMPLAINANT

vs. **OPINION**

ROBERT L. HELERINGER ..... RESPONDENT

* * * * * * * * * * * * *

The facts in this matter are undisputed, even though a lengthy evidentiary hearing was held, at the request of the Respondent. The events leading to the charge of unprofessional conduct involved litigation in the Jefferson Circuit Court over a controversial subject, abortion, and both the complainant and respondent tend to involve themselves more in the merits of the abortion issue than in the merits of whether or not unprofessional conduct on behalf of the respondent was in fact committed.

A restraining order was issued by Hon. Benjamin F. Shobe, Circuit Judge, Division 15, Jefferson Circuit Court, concerning an abortion ordinance adopted by the Jefferson Fiscal Court. This restraining order was issued on December 19, 1978. The next day at a "press conference" called by the organization known as Right to Life of Louisville, Inc., according to respondent's testimony, there were two major newspapers, three radio stations, one television station in attendance. Respondent was not only attorney for the Right to Life of Louisville, Inc., but was a member of its Board of Directors, and therefore an officer in said organization. At this press conference the Respondent, insofar as it relates to the Judiciary, was written up in the Louisville Times as follows:

> "Further, he [Respondent] lashed out at Shobe, calling the Judge's refusal to wait 'highly unethical and grossly unfair'."

In this press conference the Respondent also called for the resignation of the Board of Health members who have advocated defying the ordinance, calling their recent comments "open insurrection". Attached hereto is a Xerox copy of the newspaper article in its entirety.

The question seems to be whether or not the Respondent's

attack upon the judiciary constitutes unprofessional conduct such as to bring the Bench and Bar into disrepute or is protected by the First Amendment to the Constitution of the United States guaranteeing freedom of speech.

The Courts have frequently recognized that an attorney, both as an officer of the Court and as a citizen, has a right to criticize *in properly respectful terms and in legitimate channels* the acts of courts and judges. *Kentucky State Bar Association v. Lewis,* Ky., 282 S.W. 2d 321 (1955). As noted in the *Lewis* case, supra, every lawyer worthy of respect realizes that public confidence in our courts is a cornerstone of the governmental structure, and that he should refrain from unjustified attacks upon the judiciary, while recognizing the duty to denounce and expose corrupt or dishonest judges.

The Respondent, admitting the fact that he referred to the Judge as being "highly unethical and grossly unfair", defends the right to make such a charge by reason of his right of free speech and free discussion. The right of free speech and free discussion as to judicial determination is of prime importance under the American system and ideals of government. We must note that a lawyer is an officer of the Court, duty bound to uphold the judicial system of this Commonwealth. As noted in the language of *Taylor v. Hayes,* Ky., 494 S.W. 2d 737 (1973), the language of the Respondent "demonstrates something less than complete and total respect for the judicial system of this Commonwealth".

Though an attorney may dislike or fail to respect an individual who sits on the Bench, nevertheless it is the duty of every attorney to respect the robe that that individual wears. The robe represents judicial authority and the judicial system. There is little doubt but that the statements of the Respondent, published in a newspaper of such wide circulation as the Louisville Times, tends to tear down the respect of the judiciary that should be held by the public. There are proper places for a citizen to complain about a judge being "unethical", but the public media is not that place.

It is evident that the accused went beyond the limits of fair criticism of the Court. As stated in Cannon 1:

> "It is the duty of the lawyer to maintain towards the Courts a respectful attitude . . . whenever there is proper ground for a serious complaint of a judicial officer, it is the right and duty of the lawyer to submit

his grievance to the proper authorities."

With reference to the Respondent's contention that he had a right to say what he did by reason of the freedom of speech provided for in the First Amendment, even this right should be curbed when the integrity of the Courts has been willfully and maliciously assailed. *State Bar Commission, et al v. Sullivan,* 35 Okla. 745, 131 Pac. 703. True that a private citizen does not surrender his right to freedom of expression when he becomes a licensed attorney of his State, except where his misconduct threatens a significant State interest. The State certainly has an interest in maintaining the respect of the public for its judiciary. Surrounding a subject so filled with tenseness as is the subject of ABORTION, any comments by an officer of the Court such as the Respondent to the effect that the judge was "highly unethical and grossly unfair" impunes [sic] the entire judicial system, at least to any newspaper reader who would disagree with the Court's ruling. A leading case on the "freedom of speech question" is that of *In Re Sawyer,* 360 U. S. 622 (1959). In that case Sawyer represented a number of defendants who had been indicted and were being tried in the Federal Court for conspiracy under the Smith Act. Sawyer made a public speech to a group of laymen where she spoke of the "horrible and shocking things" going on at the trial, the impossibility of a fair trial, and the Court's ignoring the rules of evidence. Noting that Sawyer's speech did not subject her to discipline because it did not directly impune [sic] the integrity and impartiality of the Trial Court, Justice Stewart, in a concurring Opinion discussed the issue of free speech under the First Amendment as follows:

> "If, as suggested by my Brother FRANKFURTER, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitu-

tionally protected speech."

Furthermore, Justice Frankfurter, in a lengthy dissenting Opinion, states:

> "Time, place and circumstances determine the constitutional protection of utterance . . . but a lawyer actively participating in a trial, particularly an emotionally charged criminal prosection, is not merely a person and not even merely a lawyer . . . It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the Court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. 'Legal trials', said this Court, 'are not like elections, to be won through the use of the meeting-hall, the readio and the newspaper'. Bridges v. California, 314 U.S. 252, 271, 62 S. Ct. 190, 197 . . .
>
> An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not like [sic] for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this court, still exercises judicial power, those claims will be heard and heeded.
>
> Certainly, courts are not, and cannot be, immune from criticism, and lawyers of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is *unfair, that the judge lacks integrity*, the circumstances under which he speaks not only sharpens what he says but he imparts to his attack inflaming and warping significance. He says that the very court room into which he walks to plead his case is a travesty, that the procedures and

> reviews established to protect his client from such conduct are a sham. 'We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion'. In Re Howell, 10 N.J. 139, 142, 89 A. 2d 652, 653 (concurring opinion). (emphasis supplied)

In the recent South Dakota case of *In The Matter of Lacey*, 283 N.W. 2d 250 (1979), Lacey represented taxpayers who sought to halt construction of a classroom building. In a newspaper article reporting that his clients would appeal an adverse decision to the United States Supreme Court, Lacey was quoted as saying, "The State Courts were incompetent and sometimes were downright crooked, Judge Adams excepted". The Grievance Committe recommended disbarment of Lacey, but the accused defended his language upon First Amendment grounds. Noting that Lacey could have filed his complaints with the State Commission which regulated the conduct of judges, his First Amendment contention was rejected upon the grounds that attorneys must maintain the respect due to the courts of justice and judicial officers.

The Respondent should have known his statements at the press conference would serve to undermine public confidence in the integrity of the judicial process and would bring the Bench and Bar into disrepute. The subject of abortion is so controversial that the remarks about Judge Shobe could but help to cause those persons on the side of Right to Life to believe that Judge Shobe had acted with a malicious intent. The reading of the entire article in the Louisville Times is just another opportunity for the News Media to take one more slap at the judiciary. The Respondent made all of this possible with his imprudent remarks. It is the Opinion of the Board of Governors that the Respondent should be found guilty as charged and publicly reprimanded.

/s/ Frank V. Benton

FRANK V. BENTON, III, PRESIDENT
KENTUCKY BAR ASSOCIATION

MINUTES AND CERTIFICATION OF PROCEEDING BY BOARD OF GOVERNORS KENTUCKY BAR ASSOCIATION

IN RE: ROBERT L. HELERINGER

I, Frank V. Benton, III, President, do certify:

This cause came on for consideration by the Board of Governors of the Kentucky Bar Association, 14 members entitled to vote on disciplinary matters being present, and all other persons and staff absent from the room.

The record of the case was physically present.

On motion made and seconded, the report of the Trial Commissioner was received.

The case was discussed, the discussion being confined to the record.

After full consideration, a roll call vote was taken on the issue of guilt or innocence. The result:

Guilty	12
Not Guilty	1
Abstaining	1

After discussion was held on the appropriate punishment, a roll call vote was held with a majority of 13 recommending to the Supreme Court of Kentucky that the Respondent be publicly reprimanded and required to pay the costs in this action.

This certificate and minutes of proceeding, after being inspected by each member voting, are made a part of the record in this case and the minutes of the Association.

This 22nd day of March, 1980.

/s/ Frank V. Benton

FRANK V. BENTON, III PRESIDENT

ATTEST:

/s/ Leslie G. Whitmer

LESLIE G. WHITMER, DIRECTOR

[Filed August 10, 1979]

SUPREME COURT OF KENTUCKY

KENTUCKY BAR ASSOCIATION.....COMPLAINANT
v. CHARGE
ROBERT L. HELERINGER..... RESPONDENT

* * * * *

Comes now the Kentucky Bar Association, by and through its Inquiry Tribunal, and states that respondent, Robert L. Heleringer, whose last known address is Suite 709, 310 West Liberty Street, Louisville, Kentucky 40202, a member of said association, did engage in the following unethical and unprofessional conduct:

I

On or about December 19, 1978, Judge Benjamin F. Shobe, Jefferson Circuit Court, Louisville, Kentucky was presiding at a criminal jury trial in Jefferson Circuit Court. Judge Shobe ordered a recess of the criminal trial until 1:30 p.m. to hear a motion for a temporary restraining order to stop the enforcement of an ordinance of the Jefferson County Fiscal Court providing for the regulation of abortion practices. The hearing on the motion for the temporary restraining order was scheduled to begin at 1:00 p.m. At approximately 12:50 p.m. an Assistant Jefferson County Attorney, Edward Schoenbachler, appeared in Judge Shobe's office and requested that he be granted an additional twenty minutes before hearing the motion for the temporary restraining order on the ground that Schoenbachler was busy in another division of court. Judge Shobe granted the request. When Schoenbachler did not return by 1:30 p.m., Judge Shobe conducted a hearing on the motion for a temporary restraining order and granted the motion so that he could proceed with the criminal jury trial. Respondent is counsel to and a representative of an anti-abortion organization known as Right to Life of Louisville, Inc. On or about December 20, 1978, respondent attended a news media press conference called by Right to Life of Louisville, Inc. During the press conference, respondent made a statement that Judge Shobe's decision to hear the motion for a

temporary restraining order without waiting for Schoenbachler to be present was "highly unethical and grossly unfair." Respondent's remarks were published in the Louisville Times newspaper on or about December 20, 1978. A true and correct copy of said newspaper article is appended hereto, made a part herof, and marked as "Exhibit A."

WHEREFORE, complainant charges that such actions by respondent constitute unethical and unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute; and that an appropriate degree of discipline should be administered to respondent in accordance with SCR 3.380.

KENTUCKY BAR ASSOCIATION

/s/ William P. Donan

ATTEST: *WILLIAM P. DONAN, CHAIRMAN*
INQUIRY TRIBUNAL

/s/ Leslie G. Whitmer

LESLIE G. WHITMER, DIRECTOR
KENTUCKY BAR ASSOCIATION

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

KENTUCKY BAR ASSOCIATION

File No. 80-SC-188-KB
In Supreme Court

VS.

Opinion Rendered July 15, 1980

ROBERT L. HELERINGER

The Court being sufficiently advised, and this Court's per curiam opinion having been rendered July 15, 1980, it is therefore considered that this court finds the respondent Robert L. Heleringer guilty of unprofessional and unethical conduct which tended to bring the bench and bar of the Commonwealth of Kentucky into disrepute. He is hereby publicly reprimanded and directed to pay the costs of these proceedings.

A Copy - Attest:

JOHN C. SCOTT, CLERK

Issued August 5, 1980

BY /s/ Rose Tomlinson, D.C.

NO. 80-730

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT L. HELERINGER..... Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION..... Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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NO. 80-730

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT L. HELERINGER..... Petitioner

VERSUS

KENTUCKY BAR ASSOCIATION..... Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

May an attorney be publically reprimanded by the Supreme Court of Kentucky for public attribution of "highly unethical and grossly unfair" behavior to a named sitting judge, a charge that the attorney knew, or should have known, was unwarranted, was unethical and unprofessional conduct tending to bring the bench and bar into disrepute and would undermine public confidence in the integrity of the judicial process?

CONSTITUTIONAL PROVISIONS AND REGULATIONS

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abriding the freedom of speech, or of the press; or the right of the people peaceably to assembly, and petition the government for a redress of grievances.

KENTUCKY SUPREME COURT RULE 3.130:

RULE 3.130 ABA CODES OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT RECOGNIZED AS AUTHORITY

(1) Except for Ethical Considerations and Disciplinary Rules insofar as they conflict with the opinion in the United States Supreme Court in Bates v. State Bar of Arizona, the court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

(2) The Code of Judicial Conduct shall be regarded as the standard of professional conduct for a member of the bar seeking or holding a judicial office or serving as a commissioner of a court. The board

may cause to be tried all charges for unprofessional or unethical conduct tending to bring the bench and bar into disrepute irrespective of any action by the Retirement and Removal Commission.

(Amended effective January 1, 1978; January 1, 1980.)

RULES 65.03, KENTUCKY RULES OF CIVIL PROCEDURE:

A restraining order may be granted at the commencement of an action, or during the pendency thereof, without notice, if it is clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage before notice can be served and a hearing had thereon.

AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY:

DR 1-102(A)(5) A lawyer shall not engage in conduct that is prejudicial to the administration of justice.

DR 8-102(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

STATEMENT OF THE CASE

On August 9, 1979, the Inquiry Tribunal of the Kentucky Bar Association issued a charge against petitioner alleging that he had engaged in unethical and

unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute. The charge is set forth in its entirety in the Petition for Writ of Certiorari, pages A-13 and A-14.

On August 13, 1979, petitioner filed a letter with the Director of the Kentucky Bar Association demanding to know the specific provisions of the American Bar Association's Code of Professional Responsibility which he was charged with violating. Petitioner's letter was treated as a motion for a more definite statement of the charge. On August 14, 1979, the Kentucky Bar Association filed a response to the letter or motion which stated: (1) that bar disciplinary proceedings under Kentucky law are not adversary in nature but rather are fact finding inquiries into what may constitute unethical conduct; (2) that pursuant to Rule 3.130 of the Supreme Court of Kentucky, petitioner could be charged with any violations of the American Bar Association's Code of Professional Responsibility as well as any other conduct tending to bring the bench and bar into disrepute; and (3) that the charge included but was not limited to violations of Disciplinary Rules 1-102(A) (6) and 8-102 (B) as amplified by Ethical Considerations 8-6, 9-2 and 9-6 of the Code.

Petitioner filed an answer to the charge on August 17, 1979, denying that he had engaged in unethical conduct. Petitioner admitted he had stated at a public press conference that the circuit judge's actions were "highly unethical and grossly unfair." On the same day respondent also filed a motion for a hearing before a trial commissioner.

The Inquiry Tribunal determined that petitioner's answer to the charge did not raise any issues of fact but it decided to grant petitioner's motion for a hearing. On August 23, 1979, a trial commissioner was appointed to conduct an evidentiary hearing. The hearing was held on

November 28, 1979, and the trial commissioner filed his report on January 2, 1980, containing his advisory findings of fact.

The parties filed briefs. On March 22, 1980, the Board of Governors of the Kentucky Bar Association, by a vote of 12 to 1 with one member abstaining, found petitioner guilty as charged and recommended to the Supreme Court of Kentucky that petitioner be publicly reprimanded. The minutes and the opinion of the Board of Governors are set forth in their entirety in the Petition for Writ of Certiorari, pages A-7 through A-12.

The record was submitted to the Supreme Court of Kentucky on May 15, 1980. Petitioner filed a motion for review and a supporting brief with the Supreme Court of Kentucky. The Kentucky Bar Association filed a brief in response and on July 15, 1980, the Supreme Court of Kentucky rendered its detailed opinion affirming the decision of the Board of Governrs to publicly reprimand petitioner. The opinion of the Supreme Court of Kentucky is set forth in its entirety in the Petition for Writ of Certiorari, pages A-1 through A-6.

Petitioner did not file a petition for rehearing. On August 5, 1980, the Supreme Court of Kentucky entered a final mandate publicly reprimanding petitioner. The Supreme Court of Kentucky subsequently entered an order on September 19, 1980, granting a motion by petitioner to stay the execution and enforcement of the mandate for a period of ninety days to permit petitioner to petition for a Writ of Certiorari to the Supreme Court of the United States.

ARGUMENT

The facts in this case are clearly stated in the charge filed by respondent and can be found in the Petition for Writ of Certiorari, Appendix, pages A-13 through A-14.

The facts are again stated in detail in the opinion of the Board of Governors and the per curiam opinion of the Supreme Court of Kentucky set forth in full in the Petitioner's Appendix, pages A-7 and A-1 through A-2, respectfully, and need not be recited here. The facts are admitted by petitioner.

Petitioner's objection to the circuit judge's actions was that he conducted a hearing on the motion for a restraining order in an ex parte fashion without a representative from the Jefferson County Attorney's office being present to speak in favor of the ordinance. However, petitioner, as an attorney, either knew or should have known that under Rule 65.03 of the Kentucky Rules of Civil Procedure, a circuit court can issue a restraining order ex parte. In this particular instance, the circuit judge had made every effort to schedule a hearing on the motion so that all parties could be afforded notice and an opportunity to be heard prior to the issuance of any restraining order.

If petitioner believed that the circuit judge's conduct was so shocking and so unethical, he had another forum available to him in which to seek redress. Petitioner could also have filed a complaint against the circuit judge with the state Judicial Retirement and Removal Commission SCR 4.300. Instead, petitioner chose to publicly assail the judge at a news conference.

The Supreme Court of Kentucky has recognized the American Bar Association's Code of Professional Responsibility (hereinafter referred to as Code) as establishing a standard of professional conduct which every member of the bar is required to observe. SCR 3.130. The Court has also provided that attorneys may be disciplined for engaging in "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." SCR 3.130.

EC 9-2 of the Code provides, in part:

> When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-6 of the Code provides that every lawyer has a solemn duty "to encourage respect for the law and for the courts and judges thereof. . ."

DR 8-102 (B) of the Code provides: "A lawyer shall not knowingly make a false accusation against a judge or other adjudicatory officer."

EC 8-6 provides, in part:

> While a lawyer as a citizen has a right to criticize such officials (judges) publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified. (Emphasis added)

Petitioner has raised the defense that his statements accusing the circuit judge of "highly unethical and grossly unfair" conduct are protected under the state and federal constitutions guarantee of free speech. An attorney, both as a citizen and as an officer of the court has a constitutional right to criticize in properly respectful terms and through legitimate means the acts of courts and judges. A person does not forfeit his right to freedom of speech when he becomes an attorney at law and the Kentucky Bar Association through a disciplinary proceeding does not seek or desire to unnecessarily inhibit or restrict petitioner's exercise of his right to freedom of speech. However, this does not mean that an attorney may indulge in unfounded and offensive criticism of the courts and judges. Unlike the ordinary citizen, every

attorney faces an added responsibility to the court for any abuse of his ethical duties as an officer of the court. There are limits to freedom of speech. In the case of *Kentucky State Bar Association vs. Martin,* Ky., 282 S.W. 2d 321 (1955), the Supreme Court of Kentucky stated:

> Freedom of speech is not a license. It is a right or a privilege constitutionally guaranteed, but he who uses it as a license to degrade another does so at his peril. He must be prepared to prove the truth of his charges. Of course any attorney, as well as any other citizen, has the right to criticize the Courts and their decisions but the publication of false and scurrilous matters subjects them to disciplinary action. Thatcher v. United States, 6 Cir., 212 F. 801; State ex rel. Dabney v. Breckenridge, supra, 126 Okl. 86, 258 P. 744, 53 A.L.R. 1239; Snyder's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666. Id. at 326.

One of the leading cases in this area is **In Re Sawyer**, 360 U.S. 622 (1959). Sawyer represented a number of defendants who had been indicted and were being tried in the United States District Court for conspiracy under the Smith Act. Sawyer was charged with two counts of unethical conduct, one of which involved a public speech she made before a group of laymen. Sawyer spoke of the "horrible and shocking" things going on at the trial, the impossibility of a fair trial in a Smith Act Case, and the necessity of ignoring the rules of evidence if the government were to prove its case.

This Court held that Sawyer's speech could not subject her to discipline because it did not directly impugn the integrity and impartiality of the trial court but rather merely constituted permissible criticism of the Smith Act cases in general. Her references to the pending trial were deemed not to reflect on the trial

judge personally nor his conduct of the trial. At page 635 of the marjority opinion the Court stated:

> Even if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law. . . we think there was still nothing in the speech warranting the findings (that Sawyer had engaged in unethical conduct and should be disciplined). If Judge Wiig was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it imputes no disgrace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. **Petitioner did not say Judge Wiig was corrupt of venal or stupid or incompetent.** The public attribution of honest error to the judiciary is not cause for professional discipline in this country. See Re Ades (DC Md) 6 F Supp 467, 481. (Emphasis supplied).

Mr. Justice Stewart concurred with the majority's holding that the charge against Sawyer had not been proven but he went on to discuss the issue of free speech under the First Amendment:

> A lawyer belongs to a profession which inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. Id. at 646-647.

Mr. Justice Frankfurter in an incisive dissenting opinion wrote:

> Time, place and circumstances determine the constitutional protection of utterance. . . but a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not

merely a person and not even merely a lawyer. . . It is hard to believe that this Court should hold a member of the legal professional is constitutionally entitled to remove his case from the Court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. 'Legal trials', said this Court, 'are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper'. Bridges v. California, 314 U.S. 252, 271, 62 S.Ct. 190, 197. . .

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not like for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this court, still exercises judicial power, those claims will be heard and heeded.

Certainly, courts are not, and cannot be, immune from criticism, and lawyers of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpens what he says but he imparts to his attack inflaming and warping significance. He says that the very court room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct

> are a sham. 'We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion'. In Re Howell, 10 N.J. 139, 142, 89 A.2d 652, 653 (concurring opinion). Id. at 668-669. (Emphasis supplied).

In the recent case of **In the Matter of Lacey**, 283 N.W. 2d 250 (S.D. 1979), Lacey represented taxpayers who sought to halt construction of a classroom building. In a newspaper article reporting that his clients would appeal an adverse decision to the United States Supreme Court, Lacey was quoted as saying, "The state courts were incompetent and sometimes downright crooked, Judge Adams excepted." Following publication of the newspaper article, the Chairman of the South Dakota Grievance Committee wrote a letter to Lacey who admitted that the foregoing quote was accurate. The Grievance Committee recommended disbarment and Lacey argued for dismissal of the charges against him on First Amendment grounds. The court publicly censured Lacey holding that his statement to the media violated both DR 8-102(B) of the Code and a court rule obligating attorneys to maintain "the respect due to the courts of justice and judicial officers." The court completely rejected Lacey's contention that his statements constituted legitimate and constructive criticism of the state courts. The court noted that Lacey could have filed his complaints with a state commission that regulated the conduct of judges but instead voiced his complaints in precisely the manner and forum that would most likely cast doubt upon the competence and integrity of the courts. In mitigation the court cited Lacey's fifty years of practice, public service, and deteriorating physical condition which limited his practice of law.

Petitioner accused the circuit judge of engaging in "highly unethical" conduct. In his answer to the charge

petitioner said that by using the term "unethical" he meant that in his opinion the judge had violated Section A(4) of Canon 3 of the American Bar Association's Code of Judicial Conduct. The Code of Judicial Conduct has been adopted by the Supreme Court of Kentucky under Rule 4.300 and Canon 3 Section 4(A) provides, in part:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. (Emphasis supplied).

Civil Rules 65.03 expressly provides that a circuit court has the authority to issue restraining orders ex parte. Because the subject matter of the motion for the restraining order, abortion, as an issue of great concern to many members of the public, the circuit judge had tried to accommodate all parties by scheduling a hearing on the motion. Respondent submits that when the Assistant County Attorney, Schoenbachler, was unable to appear, the judge clearly had every right legally and ethically, to hear the motion and to enter the restraining order so as to avoid any further delay in the criminal jury trial. No one was denied a legal right to their day in court because the judge did not decide the merits of the case.

Respondent submits that petitioner's actions at the press conference were extremely irresponsible in that he knew the issue of abortion was a subject giving rise to great emotion and controversy among a large segment of the citizens in Jefferson County. Petitioner either knew or should have known, that his statements to the media would serve to undermine public confidence in the integrity of the judicial process and would bring the bench and bar into disrepute.

As the Supreme Court of Kentucky so aptly stated in the case of *Kentucky State Bar Association v. Lewis,* 282 S.W. 2d 320 (1955):

> We are fully cognizant of the duties owed to his client by the attorney. He is bound to use every legitimate means and maneuver to protect the interests of his clients, and to obtain for them a fair trial. He should be zealous in his advocacy of his client's rights. On the other hand, he has a duty to the Court of which he is an officer. He owes it to himself as an attorney, to his profession, and to the Court to help maintain the dignity and decorum of the Court, and thus maintain the respect of the people for judicial process. **Id.** at 324.

Respondent finds the Sawyer case, to be directly in point and in support of the decision of the Board of Governors of the Kentucky Bar Association and the per curiam opinion of the Supreme Court of Kentucky noting that these writings cite and discuss the Sawyer case. Petitioner is clearly in error when he states that the per curiam opinion of the state court decided an important question of federal law in a way in conflict with the Sawyer decision. Quite to the contrary the "balancing standards" stated in the Sawyer decision were carefully and correctly applied by both the Spureme Court of Kentucky and the Board of Governors of the Kentucky Bar Association. Respondent is mindful of the first amendment rights of a lawyer to criticize the state of the law or even to state that a judge has not properly applied the law in a particular case. Respondent is also aware that the Kentucky Constitution, as amended in 1976, provides for a state Retirement and Removal Commission which can consider alleged improper conduct by a member of the judiciary and take appropriate action against the judge in the public interest. It is certainly the duty of the bar to complain in

the proper manner about unethical conduct on the part of a judge supported by reasonable evidence.

Unlike the Sawyer case, petitioner launched an attack on the character of a named circuit judge properly performing the duties of his office.

The majority of the Court in the Sawyer case found, as a matter of fact from a record subject to varying interpretations, that Sawyer's speech did not reflect in any way on the sitting judge personally, or his conduct of the trial. Re Sawyer, Id., page 628.

There is no doubt in the present case that petitioner, without substantial competent evidence, publicly stated that a named sitting judge of engaging in "highly unethical and grossly unfair" behavior. The Supreme Court of Kentucky specifically found that petitioner's statement was unwarranted. Petition for Writ of Certiorari, Appendix, page A-6. Petitioner's speech was not only degrading to the judge, but prejudiced the administration of justice.

Both the Supreme Court of Kentucky and the Board of Governors of the Kentucky Bar Association carefully, completely and properly considered the Sawyer decision, as well as the applicable sound case law of the State of Kentucky and sister jurisdictions. There are no facts in dispute. No matter has been overlooked nor errors made in interpreting all applicable case law, both state and federal. The ordering of a public reprimand to petitioner was done only after considering the sincerity of the petitioner, his relative inexperience at the bar, the emotional issue involved and Kentucky case law. The decision is just and fair. There are no justifiable reasons for granting the writ.

CONCLUSION

For the foregoing reasons, it is respectfully

submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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